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CASE NO.

in the

Supreme Court

of the

United States

OCTOBER TERM 1983

LUIS OSCAR SARMIENTO-PEREZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

1. Whether the Circuit Court of Appeals erred in affirming the lower court's opinion in regard to the admission into evidence of the contents of a container that could not be identified and was excluded from evidence in view of the fact that this ruling is in direct conflict with similar decisions of the Circuit Court of Appeals for the District of Columbia?

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LUIS OSCAR SARMIENTO-PEREZ,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, LUIS OSCAR SARMIENTO-PEREZ, prays that as Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in the above styled case on April 26, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals printed in Appendix "A" *infra* (App.* 1) is reported at ____ F.2d ____ (11th Cir. 1984).

The opinion of the Court of Appeals, Fifth Circuit printed in Appendix "D" *infra* (App. 14) is reported at 633 F.2d 1092 (5th Cir. 1981).

JURISDICTION

The Judgment of the Court of Appeals was entered on February 6, 1984, Appendix "B" *infra* (App. 8). A Petition for a Suggestion for a rehearing *en banc* was filed on March 8, 1984 and was denied on April 2, 1984. Appendix "C" *infra* (App. 10). The jurisdiction of this court is invoked under 28 U.S.C. 1254(1) and Rule 20, Rules of the Supreme Court of the United States.

STATUTES INVOLVED

The Federal Statutory provisions involved, 21 U.S.C. 821(a)(1) and 21 U.S.C. 841(a)(1) are set forth in Appendix "E" *infra* (App. 49).

Federal Rules of Evidence: Title 28 U.S.C. Rule 104 (a)(b) Appendix "F" *infra* (App. 51).

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*numbers in parentheses prefaced by App. refer to pages of the Appendices.

STATEMENT OF FACT

The Petitioner was indicted with ROBERTO ANTONIO AGUILAR, LAURO YBANEZ and JOSE CANTU, JR. by the Grand Jury, Southern District of Texas, Corpus Christi Division, on December 11, 1978. They were charged with (1) Conspiracy to distribute cocaine in violation of Title 21 United States Code Section 841(a)(1), Section 846; (2) Two Counts of distribution and possession of cocaine in Corpus Christi, Texas, in violation of Title 21 United States Code; and (3) Two Counts of distribution and possession in Miami, Florida, in violation of Title 21 United States Code Section 841(a)(1).

ROBERTO ANTONIO AGUILAR, LAURO YBANEZ and JOSE CANTU, JR. pleaded guilty to various counts of the aforementioned indictment on June 11, 1979 before United States District Court Judge O'CONOR. (See clerk's docket sheet: date 6-11-79).

The Petitioner proceeded to trial in Corpus Christi, Texas on July 23, 1979, the Honorable OWEN D. COX, U.S. District Judge, presiding.

On July 24, 1979, the Petitioner was convicted of all counts of the indictment and sentenced to two consecutive 15-year terms and a fine of $15,000.00.

A Notice of Appeal was filed July 25, 1979.

Subsequently, the United States Court of Appeals for the Fifth Circuit reversed the aforementioned conviction and remanded the case for a new trial. *United States v. Sarmiento-Perez*, 633 F.2d 1092 (C.A. 5, 1981).

On May 21, 1981, the Petitioner filed a motion in the United States District Court, Southern District of Texas, Corpus Christi Division, to dismiss the indictment. The motion set forth as grounds that to try SARMIENTO-PEREZ again on indictment No. C-78-216 would violate his rights under the double jeopardy clause of the Fifth Amendment of the United States Constitution.

The aforementioned motion was denied by U.S. District Court Judge OWEN D. COX.

A Notice of Appeal was filed May 26, 1981.

Subsequently, the United States Court of Appeals for the Fifth Circuit affirmed the decision of the lower court, *United States v. Sarmiento-Perez*, 667 F.2d 1239 (CA 5, 1981). A Petition was filed in the United States Supreme Court for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit. This Petition was denied ____ U.S. ____.

On November 18, 1982, the Petitioner filed in the United States District Court, Southern District of Texas, Corpus Christi Division, a Motion to Dismiss the Indictment or in the Alternative to Transfer Venue, pursuant to Rule 18 Federal Rules of Criminal Procedure, to the United States District Court, Southern District of Florida.

On December 1, 1981, the Honorable HAYDEN W. HEAD, JR., United States District Judge, Southern District of Texas, Corpus Christi Division, granted the Petitioner's motion for a change of venue to the United States District Court, Southern District of Florida. On that same day, the Clerk of the aforementioned court

in Texas mailed the entire file to the Clerk of the United States District Court, Southern District of Florida.

In the United States District Court, Southern District of Florida, the case was assigned Case No. 82-734-CR-SMA.

Thereafter, the Petitioner moved to dismiss Counts I, II and III of the indictment. This motion was granted by the Honorable SIDNEY M. ARONOVITZ on January 27, 1983. See Appendix "H" (App. 55).

The case proceeded to trial on March 14, 1983 before a jury, Honorable FRANK G. THEIS, visiting United States District Judge (Kansas) presiding.

The Government called as its first witness Ismael Fuentes, a Special Agent of the Drug Enforcement Administration, United States Department of Justice. (RT 17, 18)**

Fuentes testified that in about October or November 1978 he met a person by the name of JOSE CANTU who introduced him to another person he identified as ROBERTO AGUILAR. AGUILAR in turn introduced FUENTES to a person (telephonically) who identified himself as LAURO YBANEZ (RT 19).

Pursuant to various conversations which took place in Texas, FUENTES went to Miami, Florida (RT 21). There, on November 2, 1978, at about 5:20 in the evening, FUENTES met with AGUILAR and YBANEZ at the Sheraton River House Hotel allegedly to consummate

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**numbers in parentheses preceded by the letters RT refer to pages of the original reporter's transcript.

the sale of a quantity of cocaine (RT 22). FUENTES and another D.E.A. *** agent, ZAPATA, showed $100,000.00 to YBANEZ (RT 23). Later that evening, both D.E.A. agents, YBANEZ and AGUILAR went to Room 511 of the aforementioned hotel (RT 24.)

FUENTES continued to testify that the money was shown and counted ($100,000.00). Then conversations and phone calls all occurred with himself, ZAPATA, YBANEZ and AGUILAR all present at one time or another in the hotel room (RT 26-30).

Thereafter, YBANEZ and AGUILAR left the hotel room. FUENTES further testified that they were gone for about 10 to 15 minutes (RT 32).

At this point of the trial, Agent FUENTES testified to the commencement of various actions in regard to the parties and the evidence which resulted in extensive colloquy between the court and counsel.

FUENTES testified: (RT 33)

A. "They [Aguilar and Ybanez] returned to room 511 with a box containing the cocaine.

Q. "Who had it?

A. I believe they walked in—I believe it was Ybanez that walked in with a box, a Lady Schick box containing a bag of cocaine which he gave to Spanish (presumably the record is

***D.E.A. stands for Drug Enforcement Administration, United States Department of Justice.

in error and the word should be (*Special*)) Agent Nick Zapata." (RT 33).

The Government then proceeded to mark Government's Exhibit No. 1 for identification. This was one large plastic bag filled with white powder, allegedly the contents of the Lady Schick box (RT 34).

The balance of the court day (this is specifically called to the attention of this Honorable Court) consisted of a colloquy between counsel and the court whether a proper "chain of custody" could be established if the Government could not produce or identify the "Lady Schick" box, which was the container of the white powder offered by the Government as Exhibit No. 1 for identification (RT 42-58).

The colloquy ended with the court agreeing that the chain of custody must be established that the alleged cocaine must be traced back to the defendant (RT 58).

The following day at trial, Agent Fuentes continued his testimony. He testified that his conversations in Room 511 (Sheraton River House Hotel) were monitored by agents in Room 513 of the same hotel (RT 70). He further testified that there were numerous surveillance agents in vehicles and stationary posts around the hotel (RT 71).

Although previously testifying that YBANEZ and AGUILAR had left the hotel room for about 10 to 15 minutes (RT 32), FUENTES now testified that they were gone and returned at about 9:33, 9:35 p.m.—no more than five minutes after they left (RT 71).

When YBANEZ and AGUILAR returned, YBANEZ had a box (RT 71). The box was nine inches in height, four to five to six inches in width, a Lady Schick box (RT 72).

At this time, a plastic envelope containing a folded box was handed to Fuentes and marked "Government's Exhibit No. 2 for identification." (RT 72).

The witness (FUENTES) then testified that the box he received contained a white powder crystalline substance (RT 75-76). FUENTES further testified that Government Exhibit No. 1 for identification *looked like* the substance he saw in the box, Government's Exhibit No. 2 for identification (RT 76).

It is important to note that on cross-examination Agent FUENTES conceded that the above referred to box was not given to him but was given by YBANEZ to Agent NICK ZAPATA (RT 84). He did not recall if he ever touched the box (RT 85).

The total involvement of FUENTES was to watch ZAPATA take possession of the box and he, ZAPATA, YBANEZ and AGUILAR allegedly all walked into the motel room bathroom together (RT 85-87).

The Government then called as a witness D.E.A. Agent NICHOLAS ZAPATA, JR. On direct examination he testified to the following:

On November 2, 1978, he was in a room with another agent at the Sheraton Motor Hotel in the vicinity of 3900 Northwest 21st Street and LeJeune Road in Miami, Florida. His purpose was to meet two people to

consummate a deal for the delivery of a quantity of cocaine (RT 91, 92).

While in the room at the Hotel, ZAPATA showed $100,000.00 to LAURO YBANEZ. They were later joined by ROBERTO AGUILAR in Room 511 along with Agent FUENTES (RT 94, 95). Thereafter, there was a telephone conversation in the room (RT 96).

After the phone call, YBANEZ and AGUILAR left the room (RT 101). Thereafter, in about ten (10) minutes YBANEZ and AGUILAR returned to the motel room (RT 104). YBANEZ had a Lady Schick box (RT 105). YBANEZ gave the Lady Schick box to ZAPATA. Inside there was a powdery substance (RT 106-107).

On *Voire Dire* examination as to the Lady Schick box, the following was elicited.

a.) That Agent ZAPATA received a Lady Schick box from YBANEZ and allegedly secured it in a vault (RT 111).

b.) He could not find any markings that he had put on the Lady Schick box to insure that it was the same Lady Schick box he had received from YBANEZ on November 2, 1978 (RT 111).

c.) The sworn testimony of Agent ZAPATA given at the original trial (July 23rd and 24th, 1979) revealed that:

1. The box was not sealed in an evidence envelope until April 26, 1979 after it went

through the hands of the D.E.A. Laboratory and the F.B.I. (RT 113).

2. ZAPATA's initials were not on the box (RT 112, 113).

3. ZAPATA conceded that the Lady Schick box looked like thousands of other Lady Schick boxes (RT 114).

At this point the Government withdrew the offer of the Lady Schick box into evidence (RT 114). After further examination, the evidence bag itself was withdrawn by the Government from its offer of evidence (RT 122) Appendix "I" (App. 57).

The Government then elicited in direct examination from ZAPATA that the Lady Schick box that was withdrawn from evidence allegedly contained two "plastic baggies" which contained the "white powder" contained in Government Exhibit No. 1. These plastic baggies (Government Exhibit Nos. 1C and 1D for identification) were contained in two separate evidence envelopes marked Government Exhibit Nos. 1A and 1B for identification (RT 125-128).

On cross-examination, Agent ZAPATA admitted that he could not identify the plastic bags which allegedly contained the white powder and did not know if they were the same plastic containers he got in the room. In any event, whatever plastic bags that were sent to the F.B.I. contained no identifiable fingerprints (RT 146-151). The Government never offered the plastic bags, nor were they ever received into evidence. (Appendix "I" (App. 57).

It is interesting to note at this point that the white powder (Government's Exhibit No. 1) which allegedly came from these containers that could not be identified or placed into evidence was not placed into an evidence bag nor was the powder sealed or marked until November 9, 1982, one week after the arrest and seizure of the alleged cocaine (RT 149, 150). There was no testimony as to who may or may not have had access to the white powder or how many other similar bags of unmarked white powder were in the D.E.A. Laboratory safe.

Other testimony revealed that surveillance agents observed the Petitioner pick up YBANEZ and AGUILAR at Miami International Airport and drive them to 1425 Northeast 137th Street. There, YBANEZ and AGUILAR picked up a red and white 1975 Buick automobile (RT 153-156).

D.E.A. Agent GASTON CAIRO testified that he was in the vicinity of the parking lot of the Ramada Inn, across the street from the Sheraton (RT 158, 159). At about 9:30 p.m. he saw a red and white Cadillac arrive at the parking lot followed by a red over white Buick (RT 159). The cars parked side by side, one of the "guys" from the Buick went in to the trunk, walked away, got into his car and drove off. The Petitioner was driving the Cadillac. Both cars left (RT 160).

On cross-examination, it was pointed out that at the previous trial Agent CAIRO testified that he was parked on the second floor of the Ramada Inn parking lot when he was advised that SARMIENTO was headed for the parking lot. He further testified that he drove to the lower level where he crossed SARMIENTO's

car. That was the last time he saw him around the hotel (RT 163, 164).

D.E.A. Agent ALBERT PARRISH testified that he observed a Buick and a Cadillac depart the Sheraton parking lot and proceed to the Ramada Inn parking lot (RT 172). Mr. SARMIENTO was in the Cadillac and YBANEZ and AGUILAR were outside of the Buick. He saw Mr. AGUILAR retrieve a box from the trunk of the Cadillac. Although he really could not see it, the box was a light colored box (RT 173). The Cadillac left, PARRISH went inside the hotel and made a telephone call, he then came out and saw the Buick leave (RT 174). About two hours later, PARRISH saw the Cadillac at the residence of Mr. SARMIENTO (RT 174-195). Mr. SARMIENTO was dressed in a T-shirt and shorts (RT 192).

On cross-examination, it was revealed that YBANEZ is SARMIENTO's brother-in-law (RT 180).

It was further brought out in cross-examination that what Agent PARRISH witnessed took from 10 to 15 minutes. Thus, it could not have taken the five minutes previously testified to by Agent FUENTES. (RT 190, 191).

The chemist testified that he received the evidence on November 9, 1978 and that it had been seized on November 2, 1978, thus verifying in part the testimony of Agent ZAPATA (RT 226).

The Petitioner was convicted on March 18, 1983. The Petitioner was sentenced on each Count (IV and V) to five years in prison and a special parole term of ten

years to run concurrently. In addition, he was sentenced to a fine of $30,000.00.

REASON FOR GRANTING THE WRIT

WHETHER THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT WAS IN DIRECT CONFLICT WITH PRIOR DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA WHEN IT RULED THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN RECEIVING INTO EVIDENCE AGAINST THE PETITIONER, THE CONTENTS OF A CONTAINER AFTER THE CONTAINER WAS WITHDRAWN FROM EVIDENCE BY THE GOVERNMENT AND EXCLUDED FROM CONSIDERATION BY THE JURY?

The Petitioner herein placed two issues before the Circuit Court of Appeals for the Eleventh Circuit for their determination on his appeal from the United States District Court, Southern District of Florida. In addition to the sufficiency of the evidence, that is, whether or not the circumstantial evidence was sufficient to sustain a conviction, the Petitioner strongly urged upon the Court of Appeals that the lower court erred in admitting the contraband into evidence against the Petitioner.

Petitioner's brief pointed out to the Court of Appeals, that in cases dealing with the same issue, the Circuit Court of Appeals for the District of Columbia came to the conclusions directly opposite to the ruling of the District Court during trial. In fact, the Court of Appeals

for the Eleventh Circuit ignored Petitioner's arguments. See Appendix "A" (App.) *infra.*

Thus the Petitioner is in the position of having one Circuit Court of Appeals (District of Columbia) decide an evidentiary question in a way which would favor and coincide with the contention of the Petitioner, and another Circuit Court of Appeals (11th Circuit) completely omit comment on the precedent cited in Petitioner's arguments. This, in itself, appears to be unusual as the situation presented by Petitioner's case apparently is one of first impression in the Court of Appeals for the Eleventh Circuit.

Rule 104(b) Federal Rules of Evidence, United States Code, Title 28 states in pertinent part:

> ". . . (b) *Relevancy Conditioned on Fact.* When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."

Restating the above Rule of Evidence and further elucidating on the principles governing the admissibility of tangible evidence, the United States Court of Appeals for the District of Columbia stated in *United States v. Lane*, 591 F.2d 961, 969:

> "Tangible evidence of [a] crime is admissible when shown to be in 'substantially the same condition as when the crime was committed' and it is presumed that the integrity of evidence routinely labeled by Government officials was

> suitably preserved '[unless the accused makes] a minimum showing of ill will, bad faith, other evil motivation or tampering.' If, however, the condition is met, the Government must establish that acceptable precautions were taken to maintain the evidence in its original state."

Thus, it is quite clear that a proper foundation would have to be laid by the Government prior to the admission of the evidence—in this case a bag containing cocaine.

The Government's foundation consisted of the following:

Agent ALBERT PARRISH testified that at about 9:30 p.m. on November 2, 1978, he saw the Appellant arrive at the Sheraton Motel, stay a few minutes and drive to the Ramada Inn parking lot. He observed AGUILAR and YBANEZ arrive a few minutes later and saw AGUILAR retrieve a white box from the trunk of Appellant's car (RT 172, 173). He did not observe AGUILAR and YBANEZ after they left the parking lot in their car, nor did he observe the Appellant after he left the parking lot (RT).

Approximately 10 to 15 minutes later (See testimony of Agent FUENTES (RT 32), Agent ZAPATA (RT 104)) AGUILAR and YBANEZ arrived in the hotel room and handed Agent ZAPATA a Lady Schick box (RT 111). After a short *Voire Dire* by defense counsel, ZAPATA admitted that he could not identify the box in court as the same one that he had received from YBANEZ; that he had never sealed it in an evidence envelope and in fact had not initialed the box or seen it again until

April 26, 1979, approximately six months after the arrest (RT 106-114). The Government thereafter withdrew the box from evidence. Appendix "I" (App. 57)

ZAPATA further testified that inside the now withdrawn box, there were two more containers, two plastic bags which contained white powder (RT 125-128). ZAPATA admitted that he could not identify these plastic bags and did not know if they were the same ones he received in the room. The F.B.I. could not ascertain any identifiable fingerprints on said plastic bags (RT 146-151). These bags were never offered or received in evidence. Appendix "I" (App. 57)

ZAPATA's last piece of testimony concerning the manner in which he handled the evidence was that he did not place the white powder that allegedly came from the unidentifiable container into a sealed or marked evidence bag until November 9, 1978, one week after the arrest and seizure (RT 149-150).

There was no testimony or other evidence that the box allegedly retrieved from appellant's car was the same box delivered 10 or 15 minutes later to D.E.A. Agent ZAPATA.

It is now urged upon this Court that the Government did not lay a sufficient predicate; it failed to establish a sufficient chain of custody and it totally failed to connect the Petitioner with Government's Exhibit No. 1. Appendix "I" (App. 57). Thus the Court erred and abused its discretion in allowing said evidence to be presented to the jury. Rule 104(b), Rule 901(a) Federal Rules of Evidence, Title 28.

The cases are legion in setting forth the parameters of what is acceptable when an appellant claims that no proper predicate was laid for the admission into evidence of various items nor was a proper chain of custody established.

In *Gallego v. United States*, 276 F.2d 914, 919 (C.A. 9, 1960) the Court stated:

> "[1, 2] Before a physical object connected with the commission of a crime may properly be admitted in evidence there must be a showing that such object is in substantially the same condition as when the crime was committed. This determination is to be made by the trial judge. Factors to be considered in making this determination include the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it. If upon the consideration of such factors the trial judge is satisfied that in reasonable probability the article has not been changed in important respects, he may permit its introduction in evidence. *United States v. S.B. Penick & Co.*, 2 Cir., 136 F.2d 413, 415.
>
> "The jury, of course, is free to disregard such evidence upon its finding that the article was not properly identified, or that there has been a change in its nature.
>
> "[3] The trial judge's determination that the showing as to identification and nature of contents is sufficient to warrant reception of

an article in evidence may not be overturned except for a clear abuse of discretion. No abuse of discretion was shown here."

See also *United States v. Kaiser*, 660 F.2d 724-733 (C.A. 9, 1981).

Two cases which have bearing on the case at bar are cases in which defense counsel appeared to have raised the same objections over evidence as defense counsel did here in the lower court. These cases were cited favorably in *United States v. Lane. supra*, where the court stated:

> "In *Novak v. District of Columbia*,[1] a prosecution for driving an automobile under the influence of liquor, we reverse a conviction based primarily on a laboratory report which indicated a high alcoholic content in the accused's urine. At trial, the arresting police officer testified that he obtained a urine sample, placed his initials and the accused's name on the bottle containing the specimen and delivered the bottle for chemical analysis. The chemist testified to the alcohol content of urine in a bottle labelled with the accused's name, and the report of the analysis was then admitted into evidence. *The difficulty was that the bottle to which the chemist referred was never identified as one in which the arresting officer had procured the accused's sample.* Because the Government had thus failed to establish that the specimen analyzed was the one supplied by the accused,

[1]82 U.S. App. D.C. 95, 160 F.2d 588 (1947).

we held that the proof of the chain of the custody was inadequate.[2]

"Similarly, in *Smith v. United States*[3] we reversed a robbery conviction because the Government's evidence did not show that the articles allegedly stolen had been obtained from the accused. Neither the victim nor the police officer who had supposedly taken the articles from the accused was a witness at trial and the testimony proferred to connect the accused with the articles was at best *conjectural.* (Emphasis supplied)[4] As in *Novak*, an evidentiary link essential to the Government's case was missing."

Thus, as in *Novak* and *Smith*, the evidence portrayed a singular lack of a continuous chain of custody which did not afford substantial protection to the Petitioner against misidentification, adulteration or even proof that the substance produced in court was procured from the Petitioner.

Thus the Petitioner now contends that the Circuit Court avoided ruling on Petitioner's argument including chain of custody. In so doing it denied Petitioner's right to be heard on this important question in an appellate court.

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[2]*Id.* at 96, 160 F.2d at F89.

[3]81 U.S. App. D.C. 296, 157 F.2d 705 (1946).

[4]*Id.* at 296-297, 157 F.2d at 705-706.

CONCLUSION

It is the view of the Petitioner that an analysis of all the authorities can lead to only one fair rule, that is, the Appellate Court should be obligated to decide issues brought to its attention under the following circumstances:

1. There is appellate authority to uphold the Petitioner's contention.

2. The case in point is, apparently, one of first impression in the Circuit Court of Appeals where the issue is being raised.

For each and all of the foregoing reasons it is respectfully submitted that a Writ of Certiorari should be granted by this Court.

Respectfully submitted,

S/

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed this 30th day of May, 1984 to: Solicitor General of the United States, Department of Justice Building, Washington, D.C. 20530.

ARTHUR ADDESS, ESQUIRE

APPENDIX A

UNITED STATES of America,

Plaintiff-Appellee,

v.

Luis Oscar SARMIENTO-PEREZ,

Defendant-Appellant.

No. 83-5389

Non-Argument Calendar.

United States Court of Appeals,
Eleventh Circuit.

Feb. 6, 1984.

Defendant was convicted before the United States District Court for the Southern District of Florida, Sidney M. Aronovitz, J., of distribution of cocaine and possession of cocaine with intent to distribute, and he appealed. The Court of Appeals held that: (1) the trial court did not abuse its discretion in admitting cocaine allegedly seized from defendant's accomplices, and (2) evidence was sufficient to support defendant's convictions.

Affirmed.

See also, 667 F.2d 1239; 633 F.2d 1062.

1. Criminal Law —404(1)

Connection of physical evidence with defendant may be shown by circumstantial evidence.

2. Criminal Law —338(1), 1153(1)

Trial court exercises broad discretion over admission of evidence and its determination will not be disturbed absent clear showing of abuse of discretion.

3. Criminal Law —404(4)

Failure of Government to have box presented to drug enforcement agents by defendant's alleged accomplices and plastic bags therefrom, which were alleged original containers of cocaine admitted into evidence, also admitted as evidence merely put prosecution in same posture as if box and bags had never been presented at trial and did not prevent admission of subject cocaine provided Government presented sufficient evidence from which reasonable inference could be drawn that cocaine seized by agents and introduced at trial was connected to defendant.

4. Criminal Law —404(1)

Proof of connection of physical evidence with a defendant goes to weight of evidence rather than its admissibility.

5. Criminal Law —404(4)

Evidence regarding chain of custody does not affect admissibility, only the weight of the evidence.

6. Criminal Law —404(4)

In view of overwhelming circumstantial evidence connecting defendant with cocaine admitted into evidence at trial, trial court did not abuse its discretion in admitting cocaine.

7. Drugs and Narcotics —123

Evidence was sufficient to support defendant's convictions of distribution of cocaine and possession of cocaine with intent to distribute.

Appeal from the United States District Court for the Southern District of Florida.

Before HILL, JOHNSON and HENDERSON, Circuit Judges.

PER CURIAM:

Appellant Luis Oscar Sarmiento-Perez appeals his convictions for distribution of cocaine and possession of cocaine with intent to distribute. He argues that the trial court committed reversible error when it admitted into evidence the cocaine allegedly seized from appellant's accomplices and contends that the evidence was insufficient to support his convictions.

The evidence at trial showed that Roberto Aguilar and Lauro Ybanez, along with two undercover DEA agents, were waiting in a Miami hotel room for a delivery

of cocaine. Originally, the parties agreed to a sale of two kilograms of cocaine for $160,000. The undercover agents, however, only produced $100,000 at the hotel meeting so the parties agreed to a modified sale. After the original agreement was changed, Ybanez made a telephone call to arrange for the delivery of the cocaine.

A short time later, Ybanez received a phone call and Aguilar and Ybanez left the hotel room. Other DEA agents observed Aguilar and Ybanez rendezvous with a car driven by Sarmiento-Perez. Aguilar retrieved a small, light-colored box from the trunk of appellant's car and Aguilar and Ybanez returned to the hotel. The two men entered the hotel room where the DEA agents were waiting and presented the agents with a small box, described as a "Lady Schick box," containing two plastic bags with cocaine. The weight of the cocaine in the box matched the weight of the recently modified cocaine agreement.

Aguilar and Ybanez were arrested and the box and the two plastic bags containing the cocaine were seized and placed in a DEA safe. The evidence remained in the safe until a DEA agent removed the two plastic bags from the small box, placed the bags in an exhibit bag, and sent the sealed exhibit bag to a DEA laboratory for analysis. A DEA chemist received the sealed exhibit bag, removed the contents of the two plastic bags, and forwarded the two plastic bags for fingerprint analysis. After determining that the substance taken from the two bags was cocaine, the chemist placed the cocaine into two new plastic bags and put those bags back into the heat-sealed exhibit bag that was introduced and admitted at trial as Government's Exhibit 1.

Following the arrest of Ybanez and Aguilar, law enforcement officers went to appellant's residence. The officers overheard appellant saying, "Tell the agent that he had been home all night and he was in bed, hadn't gone anywhere." A DEA agent then checked appellant's car and found the hood was still hot.

Appellant was also connected to the cocaine transaction by his admission to Brett Kimberlin, his cellmate. Kimberlin testified that appellant admitted his involvement in a drug transaction that appellant claimed to have gotten involved in as a favor for someone in his family. Kimberlin also testified that he vaguely remembered appellant telling him that the cocaine was in appellant's car or in the car's trunk.

[1, 2] Sarmiento-Perez maintains that this evidence failed to connect him with the cocaine and does not establish a sufficient chain of custody for the admission of the cocaine. His primary argument appears to be that because the prosecution failed to get the "Lady Schick box"or the plastic bags which contained cocaine admitted into evidence, the cocaine allegedly found in the box and bags could not be admitted. The connection of physical evidence with a defendant, however, may be shown by circumstantial evidence. *United States v. Hughes*, 658 F.2d 317, 320 (5th Cir. Unit B 1981), *cert. denied*, 455 U.S. 922, 102 S.Ct. 1280, 71 L.Ed.2d 463 1982); *United States v. Soto*, 591 F.2d 1091, 1099 (5th Cir. 1979). Furthermore, the trial court exercises broad discretion over the admission of evidence and its determination will not be disturbed absent a clear showing of abuse of that discretion. *United States v. Dothard*, 666 F.2d 498, 501 (11th Cir. 1982).

[3-5] The failure of the government to have the box and the two bags admitted as evidence merely puts the case in the same posture as if the box and bag had never been presented at trial. It does not prevent the admission of the cocaine provided the government presents sufficient evidence from which a reasonable inference can be drawn that the cocaine seized by the agents and introduced at trial is connected to the defendant. *See United States v. Soto*, 591 F.2d at 1099-1100. Proof of the connection of physical evidence with a defendant goes to the weight of the evidence rather than its admissibility. *Id.; United States v. White*, 569 F.2d 263, 266 (5th Cir. 1978), *cert. denied*, 439 U.S. 848, 99 S.Ct. 148, 58 L.Ed.2d 149 (1978). Likewise, evidence regarding a chain of custody does not affect admissibility, only the weight of the evidence. *United States v. Kubiak*, 704 F.2d 1545, 1552 (11th Cir. 1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 163, 78 L.Ed.2d 149 (1983).

[6] We hold that the overwhelming circumstantial evidence connecting Sarmiento-Perez with the cocaine admitted into evidence at trial demonstrates that the trial court did not abuse its discretion in admitting the cocaine. The failure of the government to persuade the trial court to admit the box and plastic bags was a matter that affected the credibility and weight of the government's alleged connection of the seized cocaine with the defendant. The defendant was free to argue to the jury that Government's Exhibit 1 was not entitled to much weight. However, the government's lack of success with the admission of the box and bags did not preclude the introduction of the cocaine.

[7] Appellant's further contention that the evidence at trial was insufficient to support his convictions is

also premised on his assertion that the government failed to link the defendant to the cocaine delivered to the DEA agents. Viewing the evidence and all reasonable inferences in the light most favorable to the government, a reasonable jury could find that the evidence establishes appellant's guilt beyond a reasonable doubt based on the evidence concerning the retrieval of a small box from appellant's car, the telephone calls and last minute reduction of the quantity of drugs by someone other than Aguilar and Ybanez, appellant's false exculpatory statement shortly after the drug transaction, and the testimony of Kimberlin that appellant admitted his involvement in a drug transaction.

There being no error by the district court in admitting the cocaine into evidence and the evidence at trial being sufficient to sustain appellant's convictions, we

AFFIRM.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 83-5389

Non-Argument Calendar

D.C. Docket No. 82-00734-CR-SMA

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LUIS OSCAR SARMIENTO-PEREZ,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

Before HILL, JOHNSON and HENDERSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 23;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of conviction of the said District Court in this cause be and the same is hereby, AFFIRMED.

Entered: February 6, 1984
For the Court: Spencer D. Mercer, Clerk

By: /s/ [Illegible]
Deputy Clerk

ISSUED AS MANDATE: APR 26 1984

APPENDIX C

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
OFFICE OF THE CLERK
56 FORSYTH STREET, N.W.
ATLANTA, GEORGIA 30303

SPENCER D. MERCER
CLERK

IN REPLYING GIVE NUMBER
OF CASE AND NAMES OF PARTIES

April 2, 1984

TO ALL PARTIES BELOW: Received 1:20 PM
4/9/83

NO. 83-5389 — USA vs. SARMIENTO-PEREZ
(D. C. No. 82-734-CR-SMA)

This is to advise that an order has this day been entered denying the petition ( ) for rehearing.

☐ The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure: Circuit Rule 26), the petition ( ) for rehearing en banc has also been denied.

☒ No member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure: Eleventh Circuit Rule 26), the petition ( ) for rehearing en banc has also been denied.

See Rule 41, F.R.A.P., and Eleventh Circuit Rule 27 for issuance and stay of the mandate.

Very truly yours,

SPENCER D. MERCER, Clerk

By /s/ [Illegible]
Deputy Clerk

Enc.

cc. Arthur Addess, Esq.
Robert Dunlap, AUSA-Miami
Patrick Coughlin, Esq.

[FILED APR 2 1984]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-5389

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LUIS OSCAR SARMIENTO-PEREZ,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion February 6, 11 Cir., 1984, ____ F.2d ____).

(April 2, 1984)

Before HILL, JOHNSON and HENDERSON, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court

be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ James C. Hill
United States Circuit Judge

REHG-6
(Rev. 6/82)

APPENDIX D

UNITED STATES of America,

Plaintiff-Appellee,

v.

Luis Oscar SARMIENTO-PEREZ,

Defendant-Appellant.

No. 79-5391.

United States Court of Appeals,
Fifth Circuit.
Unit A

Jan. 9, 1981.

Defendant was convicted in the United States District Court for the Southern District of Texas, Owen D. Cox, J., of conspiring to possess with intent to distribute, and of distributing, cocaine, and defendant appealed. The Court of Appeals, Tate, Circuit Judge, held that: (1) custodial confession by nontestifying, separately-tried codefendant, who was allowed to plead guilty to but one of five counts upon which he was indicted, was not sufficiently contrary to his penal interest for purposes of rule governing admissibility of hearsay statements, and thus such confession, insofar as it directly implicated defendant in crime charged, could not be admitted into evidence against defendant as statement against the codefendant's penal interest, and (2) admitting the confession was reversible error.

Reversed and remanded for new trial.

1. Criminal Law —417(15), 662(1)

Inculpatory statements against penal interest are admissible under rule governing hearsay exceptions and confrontation clause of Sixth Amendment only if: declarant is unavailable; statement so far tends to subject declarant to criminal liability that reasonable person in his position would not have made the statement unless he believed it to be true; and the statement is corroborated by circumstances clearly indicating its trustworthiness. Fed.Rules Evid. Rule 804(b)(3), 28 U.S.C.A.; U.S.C.A. Const. Amend. 6.

2. Criminal Law —528

Custodial confession by nontestifying, separately-tried codefendant, who was allowed to plead guilty to but one of five counts upon which he was indicted, was not sufficiently contrary to his penal interest for purposes of rule governing admissibility of hearsay statements, and thus such confession, insofar as it directly implicated defendant in crime charged, could not be admitted into evidence against defendant as statement against the codefendant's penal interest. Fed.Rules Evid. Rule 804(b)(3), 28 U.S.C.A.

3. Criminal Law —528, 1169.12

Erroneous admission, under rule governing hearsay exceptions for statements against penal interest, of custodial confession made by codefendant, who refused to testify on Fifth Amendment grounds and who was therefore unavailable as witness, was reversible error

in proceedings in which the confession was the only direct evidence identifying defendant as source of illicit drugs and as full-fledged participant in criminal enterprise. Fed.Rules Evid. Rule 804(a)(1), (b)(3), 28 U.S.C.A.; U.S.C.A. Const. Amend. 5.

Arthur Addess, Miami, Fla., Michael P. Strair, North Miami Beach, Fla., for defendant-appellant.

John M. Potter, Asst. U.S. Atty., Houston, Tex., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before THORNBERRY, RANDALL and TATE, Circuit Judges.

TATE, Circuit Judge:

The issue before us is one of first impression: May the custodial confession of a non-testifying, separately tried coconspirator/codefendant, insofar as the confessor directly implicates an accused in the crime charged, be admitted into evidence against the accused as a statement against the confessor's penal interest under Fed.R.Ev. 804(b)(3)? We hold that it may not, and we reverse this conviction wherein the coconspirator's confession, introduced because the coconspirator refused to testify on fifth amendment grounds and was therefore unavailable as a witness, Fed.R.Ev. 804(a)(1), was key evidence that the accused knowingly and willfully participated in the

conspiracy charged. Without reaching the issue of whether the admission of such evidence offends the confrontation rights of the accused under *Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965), we hold that the custodial confession of the coconspirator, insofar as it directly charges that the defendant participated in the criminal conduct charged, is inadmissible because it is not reliable or trustworthy evidence against the accused, *Douglas v. Alabama, supra*, for the purposes of the against-penal-interest exception to the hearsay rule, Fed.R.Ev. 804(b)(3).

I

Before reaching the facts of the present case, we deem it advisable to set forth the constitutional and legislative context of the problem before us.

In *Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965), the Supreme Court reversed a conviction in circumstances similar to the present ones, because the substance of a custodial confession of a separately tried codefendant, which directly implicated the accused in the crime, was admitted into evidence in the guise of cross-examination of a hostile witness. (The codefendant had asserted his constitutional privilege to not answer any questions concerning the crime.) In doing so, the Court held that the confrontation clause of the sixth amendment prevented the admission of such evidence—the reliability of its incriminating substance could only be insured by a cross-examination of the declarant designed to illuminate the accuracy of the statements insofar as they concerned the accused then on trial.

For similar reasons, in *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), the Court held that the accused's constitutional right to cross-examination was violated by the admission into evidence of the custodial confession of a codefendant, even though the trial court had instructed the jury that the confession had to be disregarded in the jury's determination of the accused's guilt or innocence. The issue before us concerns the reliability as evidence against an accused of a codefendant's custodial confession implicating the accused in the crime. With regard thereto, the dissent of Mr. Justice White for the two dissenters is illuminating. The dissenters felt that the instruction to the jury—to disregard the codefendant's confession in determining the defendant's guilt or innocence—was sufficient to prevent prejudice because the jury could easily understand the obvious inherent unreliability of a custodial confession of an accomplice insofar as it implicates an accused in the commission of a crime:

> As to the defendant, the confession of the codefendant is wholly inadmissible. It is heresay, subject to all the dangers of inaccuracy which characterize heresay generally. . . . More than this, however, the statements of a codefendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary heresay evidence. Whereas the defendant's own confession possesses greater reliability and evidentiary value than ordinary heresay, the codefendant's confession implicating the defendant is intrinsically much less reliable.

391 U.S. 138 at 141-42, 88 S.Ct. 1629 at 1630-31 (citations omitted).

As will be elaborated later, the core holdings of these decisions were not disturbed by the plurality opinion in *Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970). (This decision did hold, however, that uncrossexamined hearsay admitted into evidence by virtue of an exception to the heresay rule did not necessarily violate an accused's confrontation rights where certain indicia of reliability were met.)

The present defendant contends that an accused's constitutional confrontation rights, as explicated by *Douglas* and *Bruton*, were not affected by the promulgation of the Federal Rules of Evidence in 1975. The Rules included a new hearsay exception, which expanded the exception permitting introduction of statements against the declarant's interest; by the expansion, the exception permitted admissibility of statements against a declarant's penal interest, not only those (as before) affecting his pecuniary and proprietary interests. The new exception is provided in Rule 804(b)(3):

> *Statement against interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, *or so far tended to subject him to civil or criminal liability*, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to *exculpate* the accused is not admissible unless corroborating

circumstances clearly indicate the trustworthiness of the statement. (Italics supplied.)

With regard to the issue before us, the legislative history of the adoption of this rule is of interest. See: Rule 801, Notes of Advisory Committee, Notes of House Committee on the Judiciary, Notes of Senate Committee on the Judiciary, Notes of House Conference Committee, *West's Federal Rules, Civil Procedure—Evidence—Appellate Procedure* 218-22 (1980 ed.); 4 Weinstein's Evidence ¶ 804(b)(3)[03] at pp. 804-109 through -112 (1979); Comment, *Federal Rule of Evidence 804(b)(3) and Inculpatory Statements Against Penal Interest*, 66 Cal.L.Rev. 1189 (1978).

By a proposed final sentence to the Rule, the original 1969 and 1971 Advisory Committee drafts explicitly barred the admission under the new heresay exception of evidence such as that before us: "This exception does not include a statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused." This sentence was omitted, however, in the final unpublished committee draft forwarded to the Court in late 1971 and as promulgated by the Court in late 1972. In the process of legislative oversight over promulgation of the Rule, the sentence was first reinstated by the House, but then deleted by the Senate, an action in which the conference committee concurred. The stated reason for the deletion was in accordance with a basic rule-drafting approach to avoid codifying constitutional evidentiary principles because "[c]odification of constitutional principles is unnecessary and where the principle is under development often unwise." *West's Federal Rules, supra*, at 221.

However, the Advisory Committee Notes on the proposed rules, in all drafts, discussed the relationship of *Douglas* and *Bruton* to the penal-interest hearsay exception. In the final version of the Advisory Committee notes, it states that *Douglas* and *Bruton*

> by no means require that all statements implicating another person be excluded from the category of declarations against interest. Whether a statement is in fact against interest must be determined from the circumstances of each case. Thus a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest. See the dissenting opinion of Mr. Justice White in *Bruton*. On the other hand, the same words spoken under different circumstances, *e. g.*, to an acquaintance, would have no difficulty in qualifying. The rule does not purport to deal with questions of the right of confrontation.

West's, Federal Rules, supra, at 219-20

Summarizing the legislative history, Judge Weinstein concludes that "[i]n context, this means that the Rule should be interpreted to include this language [that the against-penal-interest 'exception does not include a statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused.']" Weinstein's Evidence, *supra*, at 804-110. On the other hand, a perceptive study concludes that the legislative history is at least ambiguous as to this issue. Comment, 66 Cal.L.Rev., *supra*, at 1198.

No decision cited to or discovered by us concerns the attempted introduction of an accomplice's custodial confession under Rule 804(b)(3) (or any other principle) as evidence of the accused's guilt. The issue would not of course arise for appellate purposes unless a district court *admitted* an accomplice's custodial confession into evidence, and possibly, until now, if presented with the issue a trial court has excluded it, either on principles of a denial of confrontation rights as expressly held by *Douglas v. Alabama*, or as insufficiently trustworthy as evidence against the accused for purposes of admission under Rule 804(b)(3).

Of the cases cited to us, the closest involving the admission in a criminal trial of uncrossexamined statements of an accomplice are *United States v. West*, 574 F.2d 1131 (4th Cir. 1978) and *United States v. Carlson*, 547 F.2d 1346 (8th Cir. 1976). In these instances, where a grand jury witness was either murdered (*West*) or intimidated (*Carlson*) before trial so as to be unable to testify, his uncrossexamined grand jury testimony was admitted under the residual exception provided by Rule 804(b)(5),[1] and confrontation rights were either

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[1]Rule 804(b)(5):

(b) *Hearsay exceptions:* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(3) *Statement against interest.* [quoted in text.]

(5) *Other exceptions.* A statement not specifically covered by any of the foregoing exceptions by having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence

held waived (by the accused's intimidation of the witness, see *Carlson*) or else not offended because of the particular substantial guarantees of trustworthiness offered by the testimony in question (see *West*). In this circuit, a conviction was reversed because of a similar attempt in the trial of an accused to use the grand jury testimony of a coconspirator, unavailable since he refused to testify. *United States v. Gonzalez*, 559 F.2d 1271 (5th Cir. 1977). We there noted that the giving of the testimony, insofar as against the accused, was in the coconspirator's best interest; it therefore did not meet the against-penal-interest requirement of Rule 804(b)(3) that it "so far tended to subject him to . . . criminal liability, . . . that a reasonable man in his position would not have made the statement unless he believed it to be true."

Whatever the merits of the judicial rationales permitting admissibility under the exceptional factual situations there presented to the courts, we do not find them particularly apposite to the determination of the precise issue before us. This, as in *Douglas v. Alabama*,

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(Footnote 1 Continued)

> of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the defendant.

concerns a custodial confession, traditionally viewed as of suspect reliability insofar as the declarant attempts to shift or share the blame, for whatever reason.

Ultimately, we determine that we need not reach the issue of whether the admission of the accomplice's custodial confession as evidence directly implicating the accused in the crime charged offended the latter's constitutional confrontation rights. We have concluded that, at the least, the custodial confession is (when offered against the accused) of insufficient reliability to permit its introduction under Rule 804(b)(3) under the test enunciated by this circuit in *United States v. Alvarez*, 584 F.2d 694 (5th Cir. 1978).[2] Before we articulate our reasons, we set forth the factual context of the present litigation in which this issue arises.

II

The defendant Sarmiento-Perez was convicted on one count of conspiring to possess with intent to distribute, and two counts of distributing, cocaine, in violation of 21 U.S.C. §§ 846 & 841(a)(1). Although the indictment charged three other codefendants with the crimes, Sarmiento-Perez was tried separately.

The evidence shows the following facts:

In 1977, Agent Ismael Fuentes of the Justice Department's Drug Enforcement Agency (DEA) was known to Jose Cantu, Jr. (a codefendant) as "Gilbert

[2]There, the admission of an oral inculpatory statement made by a dead declarant to the accused's alleged accomplice, who had pleaded guilty, was held to be reversible error.

Garza." In October of 1978, Cantu telephoned Fuentes/"Garza" to inform him that large quantities of high quality cocaine were available, and to inquire whether Fuentes/"Garza" might be interested in making a purchase. Fuentes/"Garza" expressed his interest and a meeting was arranged. Fuentes/"Garza" met with Cantu and one Roberto Aguilar (another codefendant), whose confession is the focus of this appeal.

The testimony at trial revealed that Jose Cantu had never at any time met or conversed with *Luis Oscar* Sarmiento-Perez, the defendant—his names "Luis" and "Oscar" are, however, relevant to the identification of the present defendant as a coconspirator, for Cantu knew only that the cocaine was to come from Florida. During the course of the negotiations between Fuentes/"Garza" and Aguilar, Aguilar identified his source as one Lauro Ybanez (the brother-in-law of Sarmiento-Perez, and the third codefendant). Eventually, Fuentes/"Garza" met Ybanez and concluded the negotiations in the presence of Aguilar and Ybanez. Fuentes/"Garza" never dealt directly with Sarmiento-Perez, but both Aguilar and Ybanez made references to Ybanez's brother-in-law *"Oscar,"* or *"Luis,"* as the source of the South American drugs. In addition, Fuentes/"Garza" answered a telephone call from a person who identified himself as *"Oscar"* and asked to speak to Ybanez. Another DEA agent, Nick S. Zapata, spoke to a person on the telephone who identified himself as *"Luis."*

DEA surveillance agents observed the defendant Sarmiento-Perez pick up Aguilar and Ybanez at Miami International Airport and drive to Sarmiento-Perez's

residence, where Aguilar and Ybanez picked up a white Buick, and departed. The following evening, agents observed Sarmiento-Perez arrive at the Sheraton Motel, stay a few minutes, then drive to the Ramada Inn parking lot. Shortly thereafter, Aguilar and Ybanez were seen arriving at the Ramada Inn parking lot. Aguilar was observed retrieving a box from the trunk of Sarmiento-Perez's Cadillac. (No evidence—other than the confession referred to below—shows that Sarmiento-Perez had placed this box in the trunk of his car or had reason to know of its contents.) Thereafter, Aguilar and Ybanez drove from the Ramada Inn parking lot to the Sheraton Motel, where the sale was completed, and Aguilar and Ybanez were arrested. The box was later found to contain cocaine (pretermitting chain-of-custody and inadmissible-hearsay contentions).

While in custody at the DEA offices in Miami, Aguilar tendered the handwritten confession that is in dispute on this appeal. In the confession, Aguilar identified "Oscar" (the defendant Sarmiento-Perez) as the source of the cocaine and as an active participant in the sale of the cocaine to Agent Fuentes.[3]

Sarmiento-Perez vigorously challenges the admission into evidence against him of Roberto Aguilar's confession

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[3]The confession was introduced at a non-jury *James* hearing, R.II, 147-49, in order to establish a prima facie case for admission of the alleged coconspirators' out-of-court declarations, and it was also introduced at the trial before the jury as Government Exhibit 4, R.III, 271. Aguilar's confession was, of course, not admissible as a non-hearsay coconspirator statement because made after the conspiracy was terminated by the arrests and was therefore not made "by a coconspirator of a party during the course and in furtherance of the conspiracy." Rule 801(d)(2)(E).

under both the Federal Rules of Evidence and the confrontation clause of the sixth amendment.

In response, the government argues that Aguilar's confession is clearly admissible under the Federal Rules as a declaration against Aguilar's penal interest under

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(Footnote 3 Continued)

Aguilar's confession stated as follows:

I, Roberto Aguilar arrived in Miami with Lauro Ybanez to do a coke deal with Agent Fuentes. Upon arriving, waited about 30 min. Picked up by Oscar (Lauro Ybanez brother-in-law) In red Cadillac. In route to unknown motel Lauro ask Oscar if everything was here (cocaine was here). Oscar said ("yes"). Arrived at motel. Receive a call—unknown caller telling me that we were being followed. About 1 hr. later spoke to Agent Fuentes on telephone. I told him that people were following me. We (Lauro & Oscar & me) decide to do deal the following day—11-2-78 in evening. We Lauro & I slept at Oscar's house. During day we drove looking to see if we were being follow. During time we were driving Oscar said that he thought that 17 more kilo's of cocaine were coming in soon. Also that someone had run away with one that he gave him to turn over to someone else. He (Oscar) said that cocaine was of good quality, that he was to sell to Agent Fuentes. We then went to bar to hear from Agent Fuentes—about 4:50 p.m. About 5:20 Agent Fuentes call us at Oscar's Bar to meet him at the Sheraton Inn lounge. About 7:00 p.m. arrived met Agent Fuentes and Agent Zapata. Lauro & I told the agents that Oscar was expecting 17 kilos of cocaine today or tomorrow morning. Then Lauro went Agent Fuentes & Zapata to their room. I waited in bar. Later Agent Fuentes return & I saw both agent & Lauro in room 511. Lauro called Oscar. Made arrangement to get cocaine. Lauro & I then drove our car (Buick) to Ramada Inn across from Sheraton where we met with

Rule 804(b)(3); that the same circumstances and conditions which would render the confession admissible under the Federal Rules would also prevent it from offending the sixth amendment's confrontation clause; and that, in any event, if the admission of the confession was error, the error was clearly harmless.[4]

III

Federal Rule of Evidence 804(b)(3), quoted above in Part I, provides an express exception from the operation of the hearsay rule for an extrajudicial against-interest statement by an unavailable declarant, if the statement "so far tended to subject [the declarant] to . . . criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true."

(Footnote 3 Continued)

> Oscar, waiting in Walk to red Cadillac. He got in. Trunk was open. I pick up my coat and started walking to the Buick. Lauro pick up the box of cocaine from trunk of Oscar's car. Lauro & Oscar talk for a couple of minutes & I waited outside the Buick. Then Lauro & I drove to Sheraton Inn & Lauro & I went to room 511—Lauro carrying box of cocaine, and gave it to Agent Zapata. On this same date I saw a gun in Oscar's red Cadillac in a glove compartment.

[4]Sarmiento-Perez argues in his brief and in his reply to the government's brief that the confession is inadmissible as a statement by a coconspirator under Fed.R.Ev. 801(d)(2)(E). The confession's failure to qualify as the out-of-court declaration of a coconspirator, see note 3 *supra*, does not directly preclude it from qualifying as a statement against interest within the intendment of Rule 804(b)(3).

The rule further provides that such a statement is not admissible, if "offered to *exculpate* the accused . . . unless corroborating circumstances clearly indicate the trustworthiness of the statement." However, the rule does not in express terms, as finally promulgated, regulate the admission of such a statement when offered to *inculpate* the accused. Nevertheless, the rule clearly contemplates the admission, under appropriate circumstances, of such inculpatory (to a criminally accused) statements against the declarant's penal interest. See Part I, *supra*. The draftsman of the rule "left to the courts the task of delineating prerequisites to the admissibility of inculpatory against-penal-interest hearsay," with "the central underpinning of such a safeguard . . . the confrontation clause of the United States Constitution." *United States v. Alvarez*, 584 F.2d 694, 700 (5th Cir. 1978).

In *Alvarez*, taking into consideration confrontation requirements, this court established the general criteria for admissibility of such statements under Rule 804(b)(3) and concluded that the corroboration requirement expressly imposed upon exculpatory statements must also be met by inculpatory statements, 584 F.2d at 701. Thus, under *Alvarez*, the general test for the admissibility of statements against penal interest is the same, whether those statements are offered to exculpate or to inculpate the accused: (1) The declarant must be unavailable; (2) the statement must so far tend to subject the declarant to criminal liability that a reasonable person in his position would not have made the statement unless he believed it to be true; and (3) the statement must be corroborated by circumstances clearly indicating its trustworthiness.

It does not follow, however, that the test is to be applied identically in all respects to inculpatory as to exculpatory statements against penal interest. To be sure, *Alvarez* could be read to that effect: The panel emphasized the value of establishing a unitary standard of admissibility under Rule 804(b)(3), *United States v. Alvarez*, 584 F.2d at 701, and indeed relied on prior decisions of this circuit dealing with exculpatory statements against penal interest in applying the test to the inculpatory statement then before it, *id.* 699-702 & n.9.

Nevertheless, the *Alvarez* panel did not, in terms, purport to establish the maximum limits the confrontation clause might place upon the admissibility of inculpatory statements under Rule 804(b)(3). Fairly read, *Alvarez* simply holds that the sixth amendment requires inculpatory statements against penal interest to be corroborated by circumstances clearly indicating their trustworthiness, not that sixth amendment confrontation values may not require more. Nor does *Alvarez* imply that such hearsay is necessarily tested for its reliability (i. e., as truly against the declarant's penal interest) or its trustworthiness (i. e., as clearly corroborated) when offered to *inculpate* an accused (which squarely implicates confrontation values), identically as when offered to *exculpate* an accused (where confrontation values at issue are minimal). *See, e. g.*, 4 Weinstein's Evidence ¶¶800[03], 800[04].

We therefore turn to the application of the *Alvarez* test to inculpatory against-penal-interest declarations in light of the special problems presented when, at the trial of innocence or guilt, the custodial confession of a

declarant is offered as hearsay evidence that directly implicates the criminal defendant in the commission of the offense charged.

IV

At the outset, we must take into consideration the interaction between constitutional confrontation values and a hearsay exception that permits into evidence against an accused a declarant's unsworn and uncrossexamined statements that directly and clearly implicate the accused in the commission of the crime for which he is on trial.

As *Alvarez* expressly recognized, it is the confrontation clause of the sixth amendment that forms the criminal defendant's principal protection against the use, or misuse, of incriminating extrajudicial statements. *United States v. Alvarez*, 584 F.2d at 700. The sixth amendment guarantees the "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

The right of confrontation is, of course, not absolute. In *Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970), the Supreme Court of the United States illuminated what this and other circuits have come to see as the central feature of the confrontation guarantee, *see United States v. Alvarez*, 584 F.2d at 700-01; Comment, 66 Cal.L.Rev., *supra*, at 1197 & n.48:

> The decisions of this Court make it clear that the mission of the Confrontation Clause is to advance

> a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that "the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement."

Dutton v. Evans, 400 U.S. at 89, 91 S.Ct. at 220, *quoting California v. Green*, 399 U.S. 149, 169, 90 S.Ct. 1930, 1936, 26 L.Ed.2d 489 (1970). Thus, in *Dutton*, the Supreme Court recognized the existence of certain "indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant." *Dutton v. Evans*, 400 U.S. at 89, 91 S.Ct. at 220. Such indicia of reliability include adequate prior opportunity for cross-examination, *see, e. g., California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970), and the circumstantial guarantees of reliability that traditionally have been associated with the recognized exceptions to the hearsay rule, *Ohio v. Roberts*, ____ U.S. ____, ____, 100 S.Ct. 2531, 2539, 65 L.Ed.2d 597 (1980); *see, e. g., Mattox v. United States* 146 U.S. 140, 151-52, 13 S.Ct. 50, 53-54, 36 L.Ed. 917 (1892); McCormick on Evidence § 252, at 606-07 & n.10 (1972).

The Supreme Court has been at pains to point out that the contours of the hearsay rule and the confrontation clause are not wholly congruent. Conceptually, at least, evidence sufficiently reliable to qualify for admission under a recognized exception to the hearsay rule might yet offend confrontation values; and conversely, the admission of incriminating hearsay evidence might well avoid impinging confrontation rights. *Dutton v. Evans*, 400 U.S. at 81-82, 86, 91 S.Ct. at 216, 218; *California v. Green*, 399 U.S. at 155-56, 90 S.Ct. at 1933-34. *See* 4

Weinstein's Evidence ¶800[04]; McCormick on Evidence, § 252.

Nevertheless, it is in practice difficult to discern the precise line of demarcation between the indicia of reliability that are sufficient to overcome confrontation problems and those that are sufficient to place an extrajudicial statement within the scope of a recognized exception to the hearsay rule. *See Ohio v. Roberts*, ____ U.S. ____, 100 S.Ct. at 2539. *See also, e. g., United States v. Alvarez, supra*, (admission of extrajudicial statement violated *both* hearsay rule and sixth amendment confrontation clause); *United States v. West*, F.2d 1131 (4th Cir. 1978) (same indicia of reliability rendered extrajudicial statement admissible under *both* hearsay rule and sixth amendment confrontation clause). *See also id.* at 1139 Widener, J., dissenting) (criticizing *West* majority for equating confrontation clause requirements with hearsay rule requirements).

This difficulty of imprecise demarcation seems inevitable. With *Dutton*, the Supreme Court grounded confrontation values upon the selfsame bedrock of "reliability" that traditionally has been the grounding rationale for virtually all the exceptions to the hearsay rule. When the extrajudicial statement of an unavailable declarant is admitted into evidence against a criminal defendant, confrontation issues are unavoidably implicated.

Evidence that seems likely to fall afoul of the confrontation clause will most often fail to qualify for admission under any recognized hearsay exception. The result is that where the confrontation clause is implicated, it will tend inevitably to place the threshold of

admissibility under the applicable hearsay exception at a level that will pass constitutional muster:

> The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the "accuracy of the truth-determining process." *Dutton v. Evans* 400 U.S. 74, 89, 91 S.Ct. 210, 220, 27 L.Ed.2d 213 (1970); *Bruton v. United States*, 391 U.S. 123, 135-137, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). It is, indeed, "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer v. Texas*, 380 U.S. 400, 405, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965). Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. *E. g., Mancusi v. Stubbs*, 408 U.S. 204, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972). But its denial or significant diminution calls into question the ultimate "'integrity of the fact-finding process'" and requires that the competing interest be closely examined. *Berger v. California*, 393 U.S. 314, 315, 89 S.Ct. 540, 541, 21 L.Ed.2d 508 (1969).

Chambers v. Mississippi, 410 U.S. 284, 295, 93 S.Ct. 1038, 1046, 35 L.Ed.2d 297 (1973).

When inculpatory hearsay is sought to be admitted into evidence under the aegis of a recognized exception to the hearsay rule, the right to confront and cross-examine the declarant is being asked to yield to another legitimate interest in the criminal trial process: the

recognition that the trier of fact should be afforded the opportunity to consider relevant hearsay that is sufficiently trustworthy. Nevertheless, the consequent denial or diminution of so essential and fundamental a confrontation value as the opportunity to cross-examine demands that the competing interest to which that value yields be "closely examined." *Ohio v. Roberts*, ____ U.S. at ____, 100 S.Ct. at 2538; *Chambers*, *supra*, 410 U.S. at 295, 93 S.Ct. at 1046.

Thus, a clear distinction must be drawn between statements against penal interest that are offered to exculpate a criminal defendant, as against those that are offered to inculpate him. The admission under Rule 804(b)(3) of against-interest-of-declarant hearsay statements that inculpate a criminal defendant results in the diminution of rights traditionally viewed as essential and fundamental components of an accused person's right of confrontation. Therefore, sixth amendment values demand that the threshold measure of admissibility under Rule 804(b)(3)—the *Alvarez* test—be applied in light of the "close examination" called for in *Chambers v. Mississippi*, *supra*. *Ohio v. Roberts*, ____ U.S. at ____, 100 S.Ct. at 2538. *See* McCormick on Evidence § 279, at n.45 (2d ed. Pocket Part 1978); Comment, 66 Cal.L.Rev., *supra*, at 1213-15.[5]

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[5]Indeed, given the very real dangers presented by the admission of inculpatory-as-to-a-third-person statements against the declarant's interest and the confrontation values that are inevitably at stake in such situations, the "close examination" called for in *Chambers* should inform not only the appellate review of the admission of such inculpatory statements, but the initial determination of their admissibility at the trial level as well. In most instances, the admissibility of such statements might well be tested by the trial court in a pretrial or non-jury hearing similar to that established

V

[1] Following *United States v. Alvarez, supra*, inculpatory statements against penal interest are admissible under Rule 804(b)(3) and the confrontation clause of the sixth amendment only if they meet a three-part test:

(1) The declarant must be unavailable;

(2) The statement must so far tend to subject the declarant to criminal liability that a reasonable person in his position would not have made the statement unless he believed it to be true; and

(3) The statement must be corroborated by circumstances clearly indicating its trustworthiness.

(Footnote 5 Continued)

by this court in *United States v. James*, 590 F.2d 575 (5th Cir. 1979) (*en banc*) for testing the admissibility of out-of-court declarations of an alleged coconspirator under Fed.R.Ev. 801(d)(2)(E). *See* Fed.R.Ev. 104(c); 4 Weinstein's Evidence ¶804(b)(3)[02], at 804-98, ¶804(b)(3)[03], at 804-104. Several considerations would suggest such a step: the *Alvarez* test is a test of *admissibility* governed by Fed.R.Ev. 104(a), and not a test of *conditional relevancy* governed by Rule 104(b), *see United States v. James*, 590 F.2d at 578-80, so it is therefore applied by the court rather than by the jury, *id.* at 579-80; inculpatory statements against penal interest present the same great danger of jury prejudice that is raised by coconspirator statements, *see id.* at 579, and therefore deserve the same meticulous treatment at the trial level; the potential appetite of the hearsay exception here at issue is such that it threatens to consume the coconspirator exception of Rule 801(d)(2)(E), *see United States v. Alvarez, supra*, at 701.

For present purposes, we assume that the hearsay evidence meets the criteria of (1) and (3). We now discuss, in terms of the close examination required, general considerations relevant to the determination of whether criterion (2) of the *Alvarez* test is met—that the statement, insofar as implicating the criminal defendant, is sufficiently against the penal interest of the declarant to warrant its admission under the Rule as reliable.

The government should, of course, be required to show that the statement clearly and directly implicates the declarant himself in criminal conduct. Comment, 66 Cal.L.Rev., *supra*, at 1214. *Cf.*, *United States v. Pena*, 527 F.2d 1356, 1361-62 (5th Cir. 1976) (exculpatory statement insufficiently against penal interest where "there are possible explanations . . . inconsistent with culpability").

In this regard, the "expansive" interpretation of the against-interest requirement adopted by this court in such cases as *United States v. Thomas*, 571 F.2d 285, 288 (5th Cir. 1978) ("[B]y referring to statements that 'tend' to subject the declarant to criminal liability, the Rule encompasses disserving statements by a declarant that would have probative value in a trial against the declarant.") may be well suited to test the admissibility of an *exculpatory* statement against the declarant's penal interest, such as was involved in *Thomas*. There, in the absence of conflict with confrontation values, the circumstance that the out-of-court statement would have probative value in a trial against the declarant himself is indicative that it is sufficiently against his penal interest as to be reliable.

However, the *Thomas* test is not appropriate when such hearsay is offered to *inculpate* a criminal defendant on trial. The same hearsay statement, when offered as evidence of the guilt of a criminal defendant, does not as against him necessarily possess the same reliability when subjected to the close examination that is required (see Part IV *supra*) where confrontation rights might otherwise be infringed. Given the advantages readily to be perceived in the incrimination of another for a crime in which the declarant himself is implicated, the circumstance that the inculpatory-against-the-accused statement would have probative value against the *declarant* does not necessarily indicate that, insofar as it implicates the *accused*, it is sufficiently against the declarant's interest so as to be reliable. See Part I *supra; cf., United States v. Gonzalez*, 559 F.2d 1271 (5th Cir. 1977).

For a more specific discussion of the close examination requisite to ascertain that the statement was actually against interest within the intendment of the Rule, insofar as the hearsay statement is offered to inculpate a criminal defendant, see 4 Weinstein's Evidence ¶ 804(b)(3)[02], at 804-97 through -101; and Comment, 66 Cal.L.Rev., *supra*, at 1214-15.

VI

We turn now to the task of applying this test to the confession that is the focus of this appeal, mindful of the need for close examination of all pertinent circumstances.

[2] With regard to the second criteria of the *Alvarez* test, we conclude that Aguilar's confession was not

sufficiently contrary to his penal interest for the purposes of Rule 804(b)(3).

Aguilar's statement is an explicit confession of criminal activity on his part; it thus clearly and directly implicates him in a crime and is, in this regard, against his penal interest. But our inquiry into the admissibility of his statement cannot end there. A close examination of all the circumstances surrounding the making of the statement is required in order to determine whether it so contravenes the declarant's penal interest that a reasonable person in his position would not have made the statement accusing a third person unless he believed it to be true. Such examination reveals circumstances that significantly undermine this traditional surety of the statement's reliability. This was not a spontaneous declaration made to friends and confederates, but a custodial confession, given under potentially coercive circumstances that could not at trial—and cannot now—be adequately examined. *See United States v. West*, 574 F.2d 1131, 1137 (4th Cir. 1978). There were, in addition, obvious motives for falsification—the very natural desire to curry favor from the arresting officers, the desire to alleviate culpability by implicating others, the enmity often generated in a conspiracy gone awry, the desire for revenge, all might lead an arrestee-declarant to misrepresent or to exaggerate the role of others in the criminal enterprise. Finally, it appears from the record that the declarant was allowed to plead guilty to but one of the five counts upon which he was indicted. *See* R.II: 3650, 111, 233. From these circumstances, which are not counterbalanced by circumstances indicating the reliability of the statement, it is reasonable to suppose that this declarant, and indeed a reasonable person in his position, might well have been motivated

to misrepresent the role of others in the criminal enterprise, and might well have viewed the statement as a whole—including the ostensibly disserving portions —to be *in* his interest rather than against it.

For these reasons, then, we must conclude that the confession here at issue lacks the traditional surety of reliability or trustworthiness upon which this heresay exception is grounded, and is therefore inadmissible in evidence against the defendant, Sarmiento-Perez.

VII

The unreliability of the confession in this case is predicated upon circumstances that inhere in the making of virtually every custodial confession. It is for this reason that such statements have traditionally been viewed with "special suspicion." *Bruton v. United States*, 391 U.S. 123, 141, 88 S.Ct. 1620, 1631, 20 L.Ed.2d 476 (1968) (White, J., dissenting). *See* Advisory Committee Notes to Fed.R.Ev. 804(b)(3); 4 Weinstein's Evidence ¶804(b)(3)[03], at 804-109, -110, -111 & n.32.

For those same reasons, third-party *custodial* confessions, when offered to inculpate a criminal defendant, lack those "indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant," *Dutton v. Evans*, 400 U.S. 74, 89, 91 S.Ct. 210, 220, 27 L.Ed.2d 213 (1970), are thus inherently untrustworthy in the eyes of the sixth amendment, *see Ohio v. Roberts*, ____ U.S. at ____, 100 S.Ct. at 2539, and cannot for that reason lie within

the intended scope of the hearsay exception for statements against penal interest. *See Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965).

In *Douglas v. Alabama, supra*, the custodial confession of a separately tried codefendant, who refused (as here) to testify on fifth amendment grounds, was read to the jury. In reviewing *Douglas'* conviction, the Supreme Court held that the indirect admission of the out-of-court declarant's inculpatory statement had violated Douglas' right of confrontation. *Douglas v. Alabama*, 380 U.S. at 419-20, 85 S.Ct. 1074, 1077.

Douglas focused on the right of cross-examination as the central feature of the protection afforded by the confrontation clause:

> Our cases construing the clause hold that a primary interest secured by it is the right of cross-examination; an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation. As the Court said in *Mattox v. United States*,
>
> > "The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony

> whether he is worthy of belief." 156 U.S. 237, 242-243, 15 S.Ct. 337, 339, 39 L.Ed. 409.
>
> In the circumstances of this case, petitioner's inability to cross-examine Loyd as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause.

Douglas v. Alabama, 380 U.S. at 418-19, 85 S.Ct. at 1076-77.

In *Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970), the Supreme Court held that the right of confrontation was not violated by the admission of a coconspirator's inculpatory out-of-court declaration that was admissible under the *state's* liberal hearsay exception, but inadmissible under the narrower federal hearsay exception. The *Dutton* court focused upon the now-familiar "indicia of reliability" standard as the threshold of admissibility under the confrontation clause, and distinguished *Douglas* as follows:

> This case does not involve evidence in any sense "crucial" or "devastating," as did all the cases just discussed. It does not involve the use, or misuse, of a confession made in the coercive atmosphere of an official interrogation, as did *Douglas*. . . . It does not involve any suggestion of prosecutorial misconduct or even negligence, as did . . . *Douglas*. . . .

Dutton v. Evans, 40 U.S. at 86-87, 91 S.Ct. at 218-19.[6]

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[6]Much has been made of the "crucial" and "devastating" language in *Dutton* and *Douglas*. The thrust of the language in

Dutton does not purport to overrule or modify the holding in *Douglas v. Alabama.*

To the contrary, in distinguishing *Douglas* as it did, it serves to emphasize what we now read as a key to the subsequent applicability of the *Douglas* holding: that *Douglas* dealt with "a confession made in the coercive atmosphere of official interrogation." Implicit in the distinguishing language quoted from *Dutton*, above, is the suggestion that such confessions do not fit within the class of statement *Dutton* would admit. *See United States v. West*, 574 F.2d at 1137.

Thus, we find support in *Dutton* and *Douglas* for our conclusion, here reiterated, that the custodial confession of an unavailable declarant lacks those indicia of reliability that would render it admissible in evidence against a criminal defendant within the hearsay exception

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(Footnote 6 Continued)

these decisions may be read as intending nothing more than the observation that the evidence at issue was—or was not—sufficiently damaging to the defense to be considered grounds for reversal:

> This case cannot be characterized as one where the prejudice in the denial of the right of cross-examination constituted a mere minor lapse. The alleged statements clearly bore on a fundamental part of the State's case against the petitioner. The circumstances are therefore such that "inferences from a witness's refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant."

Douglas v. Alabama, 380 U.S. at 420, 85 S.Ct. at 1077 (citations omitted).

provided by Rule of Evidence 804(b)(3). We do not therefore reach the related issue of whether its admission would likewise fall afoul of the confrontation clause of the Constitution.

VIII

[3] For the reasons delineated above, we conclude that the trial court's admission of the custodial confession of Roberto Aguilar was error. The government contends that it was harmless; we disagree.

We need not conclude that it was error of constitutional proportion in order to find it to be reversible. *See Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1976). The confession here at issue added "*critical* weight," *Douglas v. Alabama*, 380 U.S. at 420, 85 S.Ct. at 1077, to the prosecution's case, and thus constituted reversible error as affecting the substantial rights of the accused even under the less rigorous standard provided for errors of less than constitutional magnitude. *See* Fed.R.Civ. P. 61.

The Aguilar confession added critical weight to the prosecution's case against Sarmiento-Perez in two important ways. Its impact on the jury was, in all probability, quite substantial. It was the only direct evidence identifying the defendant as the source of the illicit drugs, and as a full-fledged participant in the criminal enterprise.

The other evidence connecting Sarmiento-Perez with the crime consisted of hearsay references to "Luis," "Oscar," and "Ybanez's brother-in-law," as testified to by the DEA undercover agents, and the observation of

Sarmiento-Perez picking up the principal admitted conspirators, his brother-in-law Ybanez and Aguilar, at the airport, his presence at the Ramada Inn parking lot when the cocaine was apparently obtained by Aguilar and Ybanez, and the retrieval by Aguilar of a white box from the trunk of Sarmiento-Perez's car at that time, as testified to by the DEA surveillance agents. This evidence, by itself, does not, beyond innocent explanation, prove a knowing participation in the criminal offense, or a knowing agreement (the essence of a conspiracy) to join others in a concerted effort to bring about a common end, *United States v. Perez*, 489 F.2d 51, 61 (5th Cir. 1973), cert. denied, 1974, 417 U.S. 945, 94 S.Ct. 3067, 41 L.Ed.2d 664).[7] That is, although the circumstantial evidence may be indicative that the accused was a knowing member of the cocaine-distribution scheme, we cannot say that, without the admission of the confession, the jury would not have found the accused was an unwitting accomplice of his brother-in-law rather than a knowing and willing participant in his drug-distribution efforts. In addition, the Aguilar confession was the only evidence adduced from a *participant* in the criminal enterprise that directly implicated Sarmiento-Perez.

For these reasons, we conclude that it is highly probable that the confession carried critical weight in the minds of the jurors, and thus contributed significantly to their verdict.

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[7] To be convicted of an unlawful conspiracy, the government must prove beyond a reasonable doubt that Sarmiento-Perez had knowledge of the conspiracy and intended to join or associate himself with it. *United States v. Solis*, 612 F.2d 930 (5th Cir. 1980).

Further, the confession was a crucial link in the chain of evidence used by the prosecution to establish the predicate for the admission of the admitted coconspirators' references to Ybanez's supplier as "Luis" "Oscar," or "Ybanez's brother-in-law." As this court noted in *United States v. Grassi*, 616 F.2d 1295, 1300-01 (5th Cir. 1980):

> Evidence submitted at a *James* hearing for the purpose of proving a conspiracy must, of course, be free from hearsay objection; otherwise, a coconspirator's hearsay might bootstrap itself into admissible evidence . . . [I]f a coconspirator's extrajudicial declaration is admitted into evidence, the judge must reconsider its admissibility at the conclusion of the trial. His second decision . . . is to be made by a higher standard: whether the prosecution, through independent evidence, has demonstrated the defendant's participation in a conspiracy by a preponderance of the evidence. If the prosecution has not prevailed on this point, the judge must decide whether a cautionary instruction will cleanse the record of prejudice or whether a mistrial is required.

The independent evidence to which the trial judge must turn at the conclusion of the trial must, of course, be admissible, and cannot include the extrajudicial coconspirator declarations whose admissibility is at issue. *E. g., United States v. Alvarez*, 584 F.2d at 969.

Without Aguilar's confession and the admitted coconspirators' references to Sarmiento-Perez, only the observations of the DEA surveillance agents and the fact that an unknown voice on the telephone identified

itself once as "Oscar" and once as "Luis" remain to connect this defendant to the criminal enterprise. This circumstantial evidence may or may not have been sufficient to submit the cocaine distribution charge to the jury, but it is even more doubtful that by itself the DEA agent's observations established the required prima-facie-conspiracy predicate for the admission of the coconspirator declarations that were in fact presented to the jury. Thus, the impact of this confession upon the jury's verdict is magnified by the fact that it carried with it additional evidence that in the absence of the confession would have been excluded.

For these reasons, we cannot conclude that the admission of Roberto Aguilar's confession was harmless.

IX

Having determined that the confession at issue in this case was admitted into evidence in violation of the Federal Rules of Evidence,[8] we need not decide whether it also violated the confrontation clause of the sixth amendment, nor address the other points of error[9] urged by the defendant on this appeal.

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[8]The government also urges the admissibility of this confession under the residual hearsay exception provided by Fed.R.Ev. 804(b)(5), *see* note 1, *supra*. We find no merit to this contention. Lacking the indicia of reliability required by the confrontation clause and the traditional surety of trustworthiness embodied in Rule 804(b)(3), this confession necessarily lacks the "equivalent guarantees of trustworthiness" required by the residual exception. *See United States v. Alvarez*, 584 F.2d at 702 N.10.

[9]Among the points of error raised on this appeal is the contention that the trial court erred in admitting the laboratory analysis report identifying the "white powder" as cocaine.

The conviction of Luis Oscar Sarmiento-Perez is, as to all counts, REVERSED AND REMANDED for a new trial.

(Footnote 9 Continued)

The chemist who conducted the analysis that was the subject of that report was not present at the trial. Nevertheless, the report was admitted as a business record, and a supervisory chemist from the testing laboratory was allowed to testify that the substance was cocaine, even though he had neither participated in, nor observed, the actual analysis.

While our resolution of this case makes it unnecessary for us to decide whether the trial court's ruling in this regard violated the defendant's confrontation rights, we do note that we have serious reservations about the propriety of admitting such evidence under these circumstances as business records under Fed.R.Ev. 803(6), (8), and (24). *See United States v. Oates*, 560 F.2d 45 (2d Cir. 1977).

APPENDIX E

TITLE 21 UNITED STATES CODE

§ 841. Prohibited acts A

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(a)(A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other laws of the United States relating to

narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

(B) In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall, except as provided in paragraph (4), (5), and (6) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this

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APPENDIX F

TITLE 28 UNITED STATES CODE

§ 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348.

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION
CRIMINAL NO. C-78-216

UNITED STATES OF AMERICA

vs

ROBERTO ANTONIO AGUILAR
LAURO YBANEZ
LUIS OSCAR SARMIENTO-PEREZ
JOSE CANTU, JR.

INDICTMENT

THE GRAND JURY CHARGES:

COUNT I

From on or about October 1, 1978, to on or about November 3, 1978, within the Corpus Christi Division of the Southern District of Texas, and elsewhere, and within the jurisdiction of this Court, ROBERTO ANTONIO AGUILAR, LAURO YBANEZ, LUIS OSCAR SARMIENTO-PEREZ, and JOSE CANTU, JR., did knowingly and intentionally combine, conspire, confederate, and agree and have a tacit understanding with each other to commit an offense against the United States, to-wit: to possess with intent to distribute a Schedule II Controlled Substance, that is, cocaine, in violation of Title 21, United States Code, Section 841(a)(1).

(Violation: Title 21, United States Code, Section 846)

COUNT II

That on or about October 19, 1978, within the Corpus Christi Division of the Southern District of Texas, and within the jurisdiction of this Court, ROBERTO ANTONIO AGUILAR, LAURO YBANEZ, LUIS OSCAR SARMIENTO-PEREZ, and JOSE CANTU, JR., did unlawfully, knowingly, and intentionally possess with intent to distribute a controlled substance under Schedule II of the Controlled Substances Act, to-wit: approximately One (1) Ounce of Cocaine.

(Violation: Title 21, United States Code, Section 841(a)(1))

COUNT III

That on or about October 19, 1978, within the Corpus Christi Division of the Southern District of Texas, and within the jurisdiction of this Court, ROBERTO ANTONIO AGUILAR, LAURO YBANEZ, LUIS OSCAR SARMIENTO-PEREZ, and JOSE CANTU, JR., unlawfully, knowingly, and intentionally did distribute a controlled substance under Schedule II of the Controlled Substances Act, to-wit: approximately One (1) Ounce of Cocaine.

(Violation: Title 21, United States Code, Section 841(a)(1))

COUNT IV

That on or about November 3, 1978, within the Corpus Christi Division of the Southern District of Texas, and within the jurisdiction of this Court, ROBERTO ANTONIO AGUILAR, LAURO YBANEZ, LUIS OSCAR SARMIENTO-PEREZ, and JOSE CANTU, JR., did

unlawfully, knowingly, and intentionally possess with intent to distribute a controlled substance under Schedule II of the Controlled Substances Act, to-wit: approximately Three (3) Pounds of Cocaine.

(Violation: Title 21, United States Code, Section 841(a)(1))

COUNT V

That on or about November 3, 1978, within the Corpus Christi Division of the Southern District of Texas, and within the jurisdiction of this Court, ROBERTO ANTONIO AGUILAR, LAURO YBANEZ, LUIS OSCAR SARMIENTO-PEREZ, and JOSE CANTU, JR., unlawfully, knowingly, and intentionally did distribute a controlled substance under Schedule II of the Controlled Substances Act, to-wit: Approximately Three (3) Pounds of Cocaine.

(Violation: Title 21, United States Code, Section 841(a)(1))

A TRUE BILL:

_____

FOREMAN OF THE GRAND JURY

J. A. "TONY" CANALES
United States Attorney
By: _____
ROBERT A. BERG, Assistant
United States Attorney

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-734-CR-SMA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LUIS OSCAR SARMIENTO-PEREZ
Defendant.

ORDER GRANTING MOTION FOR DISMISSAL OF COUNTS I, II AND II OF THE INDICTMENT

The Defendant LUIS OSCAR SARMIENTO-PEREZ having moved this court ore tenus on January 17, 1983 to dismiss Counts I, II and III of the indictment herein, and the Government having joined in said motion, and the court having heard arguments of counsel for the Defendant and counsel for the Government, and otherwise being fully advised in the premises it is hereby:

ORDERED AND ADJUDGED as follows:

1. Defendants motion for a dismissal of Counts I, II and III of the indictment is granted.

2. Defendants previously filed motion for a "James" Hearing is denied in that said motion is moot.

DONE AND ORDERED in Chambers at Miami, Florida, this 27 day of January, 1983.

SIDNEY M. ARONOVITZ
UNITED STATES
DISTRICT JUDGE

Copies Furnished to:

Arthur Addess, Esq.
Robert A Berg, Esq., AUSA, So. District of TX
Robert Dunlap, Esq., AUSA, So. District of FL

APPENDIX I

EXHIBIT SHEET

CASE NO. 82-734-CR-SMA

MARCH 1983
GOVERNMENT EXHIBITS

NO.	DESCRIPTION OF	ID	OFF	ADM	DISPOSITION OR WITNESS
1	White Powder Substance in Plastic Envelope	3-15	3-15	3-15	Fuentes/ Cottrell
2	Plastic Envelope Withdrawn To Box	3-15	3-15		Zapata
3	Folded (Lady Schick) Box Withdrawn	3-15	3-15		Zapata
1A	Plastic Envelope	3-15			Zapata
1B	Plastic Envelope	3-15			Zapata
1C	Plastic Bag	3-15			Cottrell
1D	Plastic Bag	3-15			Cottrell
4	Chart (Figures)	3-15	3-15	3-16	Cottrell1
5	Motion Exhibit After Verdict	3-15		(Withdrawn)	

APPENDIX J

[FILED '83 MAY 18]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 82-734-CR-SMA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LUIS OSCAR SARMIENTO-PEREZ,
Defendant.

NOTICE OF APPEAL

All parties to these proceedings take notice that the Defendant, LUIS OSCAR SARMIENTO-PEREZ, hereby gives notice of his appeal to the United States Circuit Court of Appeals for the Eleventh Circuit from the judgment and sentence of this Court entered on the 18th day of May, 1983, based upon the jury's verdict in this case.

All parties to these proceedings are called upon to take notice of this filing and the appellate proceedings

commenced thereby and to judge their conduct accordingly.

DATED at Miami, Florida May 18, 1983.

Respectfully submitted,

ARTHUR ADDESS
Attorney for Defendant,
Luis Oscar Sarmiento-Perez
Suite #300
1460 Brickell Avenue
Miami, Florida 33131
Phone: (305) 374-1460